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1947. K File No. B. Transfer of Property and Indian Succession. 47

Legal DEPARTMENT

B BRANCH

2915

Subject:—

A Bill to amend the Transfer of Property Act, 1882 The Hindu Disposition of Property Act, 1925 in Application to the Province of Bombay.

[L.A. Bill No. XIV of 1946]

[L.A. Bill No. LVI of 1947]

[Bombay Act, No. LIV of 1947].

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C O N T E N T S.

Legal Department File No. B. Transfer of Property and Indian Succession/47.

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PBM. 23/5
5C

BOMBAY INCORPORATED
LAW SOCIETY
TEL. No. 32265.

HIGH COURT ANNEXE FORT,

Bombay 21st June 1946

To

The Legal Remembrancer,
The Government of Bombay,
Bombay.

Sir,

I have the honour to forward herewith a Memorandum for amendment of the Transfer of Property Act and the Indian Succession Act, Ex. "C" to the Memorandum is a draft of the Bill incorporating the necessary amendments My committee trusts that the necessary steps for effecting the amendments will be taken immediately.

I have the honour to be,
Sir,
Your most obedient servant,
Sd/-
Assistant Honorary Secretary,

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I have seen the Bill. I think it should be passed as soon as possible. The Bill if passed will be beneficial to all the communities. As it is to be Provincial legislation, care has been taken to see that the powers of the Provincial legislatures are not exceeded.

Sd/-

20-6-1946

PSM. 22-5
4C

Re: Section 13 of the Transfer of Property Act and section 113 of the Indian Succession Act.

Trusts have been in existence in the Province of Bombay for the last one hundred years or more. Before the Succession Act, 1865, trusts were made in the English form. The draftsman took care to see that the laws regarding perpetuity were not violated. The Succession Act of 1865 introduced section 100 corresponding to the present section 113 of the Succession Act, 1925, and section 13 of the Transfer of Property Act. That section was a departure from the English law. It provided that if a bequest was made to an unborn person subject to a prior bequest, then such later bequest would be void unless it comprised the whole of the remaining interest of the testator in the thing bequeathed.

2. The exact significance of the section was not understood for a long time until the Bombay High Court decided the case of Putlibai Vs. Sorabji, commonly known as Gamadia's case. The Privy Council confirmed the decision of the Bombay High Court. The Privy Council decision is reportedi in 1927-25 Bombay Law Reporter. 1099

3. In Gamadia's case, the testator directed that after the expiration of the ten years from his death, his estate should be divided into five equal parts, each part being held in trust for each of the five sons of the testator. Each son was to get a life interest in his share and, on his death, the income of his share was to be given to the persons presumptively entitled to the corpus, until the death of the last surviving son of the testator. The Court held that the trusts were void, because the unborn children of the son who would be presumptively entitled to the corpus got only the income of his share to start with. If these x unborn children died, before they became entitled to the corpus, on the death

of the----

of the last surviving son then they did not get the whole interest, but only a life interest. Section 13 was therefore violated. The will also contained further provisions to the effect, for example, that if any beneficiary alienated or charged his share, the trust in his favour would cease, but the trustees could employ the income for his benefit. That provision also made the trusts void, because the unborn persons got a limited interest.

4. For several years subsequent to that decision, whenever trusts were created by solicitors in Bombay, they avoided giving any interest to unborn persons which was not the whole of the remaining interest of the testator. Trusts were therefore made in some such form as follows:

5. If the testator had two sons, A and B, he directed that the trust fund should be divided into two parts and that the trustees should hold one part upon trust to give the income thereof to A during his life time and, on his death, to divide the corpus of the part between A's children and remoter issue who survived at A's death. It was further provided that if A died without leaving any child or remoter issue him surviving, his part would go to B for life and on B's death, to B's children and remoter issue living at B's death. This was the usual form adopted by the draftsman and he felt that he was not violating section 113 of the Succession Act or section 13 of the Transfer of Property Act, because the whole of the one half part went to the children and remoter issue of A who survived A. If they did survive A, then they took the whole of the corpus in an unfettered manner. If they did not survive A, they did not take at all under the gift, because the gift was only to those children of A who survivied A.

6. In some other cases, a provision in the trust deed was that the corpus of A's part would go to such of A's Children as attained the age of 18 years. See, in this connection, the illustration to section 121 of the Succession

Act. It------

Act. It was considered that the gift to the children of A who attained 18 years and, in default, to B's children who attained 18 years, was valid for reasons stated above.

7. It was also usual to give to A a power of appointment under which he had the right to select A's children who could take the benefit of the trust and disinherit any child who was not fit to take. It was also usual to insert in deeds of trust inter vivos a power of redogation and new appointment, so that the settlor was free to alter the trust from time to time, as circumstances required.

8. Although the above is the usual type of the trusts made by a settlor, either inter vivos or by his will, most of the provisions thereof are void according to the recent decision of the Privy Council in the case of Sopher Vs. Administrator-General of Bengal (48 C.W.N. 585) According to the Privy Council, the correct legal position is not that no gift at all is made to A's children who do not survive him, but the proper construction is that A's children get the estate which is only completed on their surviving A, or, in the second case mentioned above, on their completing 18 years. In other words, the unborn children acquire an interest subject to their fulfilling a contingency. Secondly the unborn children acquire an interest which is liable to be defeated on a contingency, as, for example, their being born and dying before 18 years. Then again, according to the recent decisions of the Bombay High Court following Sopher's case, the unborn children do not get the whole interest because of the presence in the deed of trust of the power of appointment and the power of revocation.

9. The result is that a deadlock has been created by the decision of the Privy Council. Several suits have been filed in the Bombay High Court wherein the children of the testator or the settlor who have been given only

life -----

life interests are claiming an abbolute interest in the property, on the ground that the trusts are void. It is apprehended that other suits are being filed for a similar relief and that the original intention of the settlor to create a trust for his family is being frustrated on a technicality of law. Secondly, lawyers in Bombay find it impossible to create trusts for their clients, even of the normal type. If a settlor has two children, A and B he cannot btop the trusts half way by simply providing that A's share shall go to his children. A may never have any child and the testator would like to provide for the contigency of xA dying childless. Similarly about B and his other children.

10 A further difficulty created by the Privy Council decision which is of a serious nature is that if the trust deed contains a clause under which the trust fund goes x ultimately to bharity. then the charity takes effect, even though the settlor's children may have issue. This is because in construing section 13, the possibilities and not the actual factsx are taken into consideration. And, if on a possibility the trusts are void, the subsequent trusts in favour of the members of the family are also void under sections 15-16 of the Transfer of Property Act, but the ultimate gift in favour of charity is saved by section 18 of the Act which provides that the restriction in section 16 does not apply in thecase of a transfer for the benefit of charity. See, in this connection, Mulla's Transfer of Property Act, Second Edition, page 118 para 3A, under head "Indian Succession Act,". The result is that unless some relief is given immediately by way of legislation, properties, in respect of which a settlor has created trusts which are void, according to the Privy Council decision, w ill go to charity, even though the settlor's descendants are living and would have taken under the trusts, if they were valid. It should also be remembered that final decrees of courts operate as <u>resjudicata</u> and, if the legislation is xdelayed, great harm will be caused to beneficiaries

whose.---

whose cases are pending before the High Courts.

11. The Central Legislature introduced a bill in the Legislative Assembly in February 1946, for the repeal of section 13, T.P.Act and sec. 113, Succession Act. A copy of the bill with the statement of objects and reasons is hereto annexed and marked "A". The bill was referred to a select committee. It appeared that there was a difference of opinion between the members of the select committee as to the necessity for the bill as a Central enactment with application throughout British India. It was thought that the Province of Bombay was the only province where transfers and bequests had been made to any considerable extent under an erroneous interpretation of the provisions which the bill sought to repeal. In view of the fact that the subject-matter of the bill was in the concurrent legislative List, and the Central Legislature allowed the bill to drop left the question of introducing the relevant legislation to be considered by the Provincial Governments.

12. As will be seen from the bill introduced in the Central Legislative Assembly, the proposed amendment was to repeal section 13 of the Transfer of Property Act and section 113 of the Succession Act, with consequential amendments in the Hindu Disposition of Property Act, etc. While the matter was being considered by the Central Legislature, it was suggested in some quarters that, instead of repealing the sections, they should be amended. Three eminent counsels of Bombay, namely Sir Chimanlal Setalvad, Sir Jamshedji B. Kanga and Mr. Motilal C. Setalvad, were consulted on the question. They were unanimously of the opinion that an amendment of the sections would not fully meet all the difficulties created by the decision of the Privy Council. Hereto annexed and marked "B" is a copy of the opinion.

13/ The decision of the Privy Council is of a sweeping nature under which the initial gift in favour of the unborn children of the life tenant is itself bad, because they take under a contingency. Then again they lose under a contingency. Thirdly the powers of appointment and the

powers of revocation make the trust bad. All these factors would have to be considered, in case we simply amend the sections and do not repeal them. Attention is also invited to the illustration to section 121 of the Succession Act, referred to above. That illustration is as follows:-

"A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest".

The form of the bequest in the above illustration is Act, under which there should always be a continuity of estates. This is the reason why the income is given to the children of A mentioned in the illustration, untilll they attain the age of 18. If, however, any of them dies before attaining 18, his interest will cease and, in such case, it cannot be said that such a child gets the whole of the remaining interest of the testator in the funds and an amendment of the section would have to take this fact also into consideration. Then again, in many cases, the Settler desires that in case his son A dies childless, an annuity should be given to his widow during her life time and the estate should not be divided untill the death of his son B. If, however, A's widow is unborn at the date of the settlement would the bequest in her favour fail. A provision in that behalf would also have to be incorporated in the amendment. The result would be that if we make a very long amendment to the section, we would find that we are not ~~xxx xxxxxxxxxx xx x x~~ giving even substantially the whole of the remaining interest of the transferor in the property to the unborn person, as that expression has been interpreted by the Privy Council. There would be too many exceptions provided by the amendment and, in practice,

practice, such exceptions would be about 90 per cent. of the interest of the t
whole of the remaining ~~xx xxxxxxxx~~ transferor, with result that the section would be rendered nugatory and the remaining 10 per cent would not be worth keeping in the section as it is would only lead to litigation.

14. Hereto annexed and marked "C" is a draft of the bill which may be introduced in the Provincial Legislature. It will be seen that it proposed to apply the Act to all immoveable properties within the Province of Bombay and to all documents executed within the Province, . Whether before or after the commencement of the Act. This is in accordance with the Registration Act, and will avoid any conflict between provinces inter se.

15.The saving clause has been inserted in the Bill because it is likely that some persons may have acquired a trust property for valuable consideration and such persons should be protected. If, for example, under the law as it was understood prior to the Privy Council decision, the trust was admittedlybad as containing several clauses of defeasance in respect of the trusts of the unborn persons, as in Gamadia's case, the settlor's own children who had life estates would become absolute owners in view of the invalidity of the subsequent trusts. If these children of the settlor consulted a lawyer, they would be advised that the trusts were bad and that they were the full owners of the property and, and as such, competent to transfer the property by way of sale, mortgage or otherwise. The purchaser's solicitor would also agree to accept the title from the children of the settlor. It is necessary that such a purchaser or mortgagee, who has paid valuable consideration, should be protected.

16. Insome cases, there may not be a sale or mortgage but there may be a deed of gift made by the life tenant who became the absolute owner, according to the then law. It is for consideration whether such donees should also be protected. If so, the word "Valuable" should also be omitted between the words "for" and "consideration".

17. For reasons stated above, it is necessary that the bill should have a retrospective effect. The difficulty created by the Privy Council decision extends not only to deeds which are to be made in future, but also to trusts which are in existence including these which are the subject-matter of litigation in the Bombay High Court. It is desirably that a uniform rule should be applied to all trusts, present as well as future, even though exceptions may have to be made in the cases in which a final judgment has been obtained by the beneficiaries prior to the amendment of the Act, or where the property has been transferred for valuable consideration. In the case of a large majority of the existing trusts, they are either originally irrevocable or have been made irrevocable for periods exceeding six years, in view of section 16(3)(c) of the Income-tax Act. It is not possible for the settlors, in these cases, to execute a deed of revocation and new appointment, and they are placed in the unfortunate position of being aware that the documents executed by them are liable to be treated as void and yet being without any means to remedy the defect. Apart from this, the provisions of section 16 of the Transfer of Property Act and section 115 of the Succession Act complicate the issue further. It is possible that by reason of these sections, some members of a class would be declared entitled to take under the trust, while other members of the ~~it~~ class (who would in most cases be brothers and sister of the first named member) would not get the benefit of the trust. This also leads to iniquitous results. It is therefore essential that retrospective effect should be given to the legislation.

18. In order to avoid trustees and beneficiaries obtaining by tacit consent a decree of the High Court before the bill becomes law, it is proposed that the Act should protected only those decrees and assurances which were completed before the introduction of the bill.

Legal Department.

A Bill has been prepared to repeal section 13 of the Transfer of Property Act, 1882, and section 113 of the Indian Succession Act, 1925, and to make certain consequential amendments in those Acts and in the Hindu Disposition of Property Act, 1916, since those sections have become almost unworkable and are likely to give rise to a large volume of litigation by reason of the decision of the Privy Council in Sopher's case (46 B.L.R. 865).

2. The Bill follows the lines of the Bill drafted by the Bombay Incorporated Laws Society (slip M).

3. As the Bill is important and its urgency need hardly be stressed, the Advocate General is requested to offer his remarks on the Bill, particularly on clause 2 thereof. The point on which Government would like to have his advice is whether with reference to section 99(1) of the Government of India Act, 1935, it is competent to the Province to legislate in respect of the following cases:-

(1) Where a trust, will or other testamentary disposition is executed in the Province of Bombay by a person domiciled in the Province and relates to property both moveable and immoveable partly situated within the Province and partly without . Would the Province be competent to legislate so as to cover the moveable and immoveable property situate outside the Province.

(2) Where a trust, will or other testamentary disposition is executed outside the Province of Bombay by a person domiciled in the Province, and relates to property both moveable and immoveable, situated partly within the Province and partly without . Would the Province be competent to legislate so as to cover

(1) moveable and immoveable property within the Province and (2) moveable and immoveable property outside the Province.

(3) Where a trust, will or other testamentary disposition is executed in the Province of Bombay by a person not having his domicile in the Province, and relates to property both moveable and immoveable, situate partly within the Province and partly without. Would the Province be competent to legislate so as to cover (1) moveable and immoveable property within the Province and (2) either or both moveable and immoveable property outside the Province.

4. As Government are anxious to introduce the measure in the current session of the Bombay Legislative Assembly, the Advocate General is requested to return the papers with his opinion with as little delay as possible, and to xx suggest such changes in the draft bill as he may deem expedient.

Id/- P.N.H.
22/7/46

Secretary to the Govt. of Bombay,
Legal Department.

U.R. to Advocate General, No. 280-L, dated the 22nd July 1946.

No. 14 of 1946.

ADVOCATE GENERAL's CHAMBERS
HIGH COURT,
Bombay, 31st July 1946.

U.R. to the Advocate General, Bombay No. 280-L, dated the 22nd July 1946.

Re: Bill to amend the Succession Act, etc.

O P I N I O N.

The primary meaning of the words " may make laws for the Province" is that any law enacted by the Provincial Legislature will not operate beyond the territorial limits of the Province and will operate on persons, property, and things within the Province; but this broad proposition must be qualified by certain well known canons of laws. These are, that while immoveable property is governed by the law of the place where it is, moveables are governed by the law of the person i.e. of his domicile, Applying, therefore, these broad principles, it can be stated at once that a Provincial Act can operate upon and affect all immoveable property within the territorial limits of the Province and it can also operate upon and bind all persons domiciled within the Province. There are of course statutes of certain kinds which can and do dontrol and affect persons physically within the Province whether domiciled in the Province or not; but these are of a difficult nature and deal with quite diffisent subject matters.

Speaking more particularly of legislation in respect of trusts, wills and other testamentary documents, the firmly established rule is that immoveable property is exclusively subject to the laws of the Government within whose territory it is situated.

Stoyy, L.C.S. 428

1893 Appeal Cases 602.

Thus it is of no consequence that a will or tru.. creating rights in or over immoveable property was executed within or without the Province or that the executant was resident or not resident, domiciled or not, within the Province Supposing immoveable property is situated outside the Province of Bombay the Courts of such other Province would not recognise a statute as operating on such property, if made by some other Province, and since the Courts of that Province alone could make effectual orders for possession and enjoyment it is those Courts which should determine rights.

It is unnecessary to deal with certain refinements, as for instance, the possibility of the trustees of a settlement or executors of a will being within the Province and the power of the Courts of the Province to act upon them in personam for certain purposes, and so perhaps indirectly affect immoveable property elsewhere. Such cases are exceptional and I repeat that the Provincial legislature is competent to legislate so as to affect only the immoveable property which is within its boundaries.

As to moveables, "the right and disposition of moveables is to be governed by the law of the domicile of the owner and not by the law of their local situation".

Winans Vs. Attorney-General
1910 Appeal Cases 27 at page 32
and
Dicey's conflict of laws page 972.

Consequently a Provincial Statute can operate to affect the moveables of a person domiciled within that Province, wherever that are situate. "If such a person dies it is not the law of the country in which the property is but the law of the country of which he is a subject that will regulate his disposition.".

1791 L.R.Bl. - 690
Dicey's Conflict of Laws
29 - page 991.

So if a person domiciled in another Province disposes by will or trust of property situate within the Province of Bombay the law applicable in regard to moveables comprised in such disposition will be the law, which he carries with him, i .e. that of the Province of his domicile. If by that law a disposition is invalid, the Courts of this Province would be bound to give effect to such law though by the law of this Province it may be valid.

In the case of dispositions embracing both kinds of property, the matter is somewhat more difficult. Ordinarily each kind of property will be governed by different considerations, but if the clear intention of the settlor or testator is that both shall devalue or be dealth with in the same way and with the same incidents then such intention may be given preference over any difference in the law affecting respective kinds of property.

Having regard to the many distinctions and refinements of this branch of law, and having regard to the comparatively short time within which the opinion is required, I deal with the questions formulated in a general manner.

1) The Province cannot legislate so as to cover immoveable property outside the Province, by which I mean that any legislation purporting so to do in express terms would be contrary to section 99 of the Government of India Act. As to moveable property outside the Province, the Provincial legislation must seek to affect it only so far as it belongs to a person domiciled within the Province. The factor of execution within the Province, is not enough to give the legislatiwa jurisdiction affect immoveables without the Province, or moveables wherever situated not of a person domiciled in the Province.

Province.

2) The Province is competent to legislate so as to cover immoveable property within the Province where the disposition is by a person domiciled in the Province regardless of the place of execution of the trust, will or other testamentary disposition. It can legislate to affect moveables also wherever situate.

3) In the case of a trust, will or other testamentary disposition executed within the Province by a person not domiciled in the Province but not moveable property if within the Province but not moveable property, the disposition of which would be covered by the law of his domicile. The questions asked contemplate dispositions, by a person domiciled within the Province, and by a person domiciled outside, comprising both kinds of property, and partly within and partly without the Province. In the absence of legislation expressly purporting to deal with each permutation the Courts would apply the broad principles above mentioned. If legislation purports expressly to deal with each of them, but so as to contravene these broad principles, the Courts may hold legislation to be contrary to Section 99.

Dealing with the actual legislation at present contemplated Section 2A is correct. As to 2(b), in my opinion is so far as it seeks to affect moveable property, wherever situate, only on the ground of execution of the document within the Province, goes too far. But I see that there may be great difficulty, if the element of domicile is introduced particularly in a town such as Bombay, which has many residents who come from neighbouring provinces, or states and whose domicile may be to say the least doubtful. I believe the framers of the Bill, purposely avoided it as inviting complications. I think that Section 2 may well be left as it is leaving it to the Courts afterwards to determine its operation.

PSM. 23/5
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Sd/-
Advocate General.

Office of the R.L.A.

A revised draft Bill together with the Statement of Objects and Reasons is sent herewith. A copy of the Advocate General's opinion together with a copy of the Statement of the Case is also sent herewith.

2. The subject-matter of the Bill falls under entries 7, 8 and 9 in List III in the Seventh Schedule to the Government of India Act, 1935. As the provisions of the Bill are repugnant to the provisions of the Transfer of Property Act, 1882, and the Indian Succession Act, 1925, which are existing Indian laws relating to matters enumerated in the Concurrent Legislative ~~Kummitt~~ List, viz, wills, transfer of property and trusts, it will be necessary to reserve the Bill for the consideration of the Governor-General with reference to section 107(2) of the Government of India Act, 1935.

3. The Bill does not require any sanction or recommendation or affect any special responsibility of the Governor under section 52(1) of the Government of India Act, 1935.

4. The Home Department will no doubt take immediate steps to get the Bill printed and forward the same to the Legal Department to enable it to publish the Bill not later than the 24th August 1946.

Remembrancer of Legal Affairs.

U.R. to H.D.,No. dated the August 1946.

PSM. 23/5
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STATEMENT OF OBJECTS AND REASONS.

Under section 113 of the Indian Succession Act, 1925, which replaced section 100 of the Indian Succession Act, 1865, a bequest made to an unborn person subject to a prior bequest ~~mx~~ contained in the will is void unless it comprises the whole of the remaining interest of the testator in the thing bequeathed. In relation to transfers, an identical provision is contained in section 13 of the Transfer of Property Act , 1882.

2. Relying on certain judicial dictum the legal profession in Bombay for a long time past acted on the view that there was nothing in those sections to preclude, for instance, a trust which gave a life interest to the settlor's son and on the son's death to such of his sons as may survive him (although they may not be inexistence at the time of the transfer), and, if the son left no sons, to the other sons of the settlor and a large number of such dispositions have been framed by the lawyers in Bombay. The Privy Council ruling in Sopher Vs. the Administrator General of Bengal (46 B.L.R. 865) invalidates all those dispositions. The number of such dispositions have been affected is so long that a great and extensive hardship would be caused if they were to continue to be invalid. It is, therefore, proposed to validate all such dispositions made prior to the first day of January 1945, but not so as to affect or prejudice rights already acquired under a final decree or order of a competent court or for valuable consideration.

Dated 6th October 1947. Sd/- D.N.Desai.

By order of the Governor of Bombay,

Sd/-P.M.Lad,
Secretary to the Government of Bombay,
Legal Department.

Dated the 6th October 1947.

PSN. 23/5
4C

GOVERNMENT HOUSE,

Ganeshkhind, 14th October 1947.

I accord sanction under section 299(3) of the Government of India Act, 1935, to the introduction and moving in the Bombay Legislature of the Disposition of Property (Bombay)Validation Bill, 1947.

Sd/-

GOVERNOR OF BOMBAY.

PSM. 23/5
4C

Office of the R.L.A.

Statement of the Case.

Please refer to your opinion No. 14 dated the 31st July 1946 on the Transfer of Property, the Hindu Disposition of Property and the Indian Succession (Bombay Amendment) Bill, 1946.

2. It may be recalled that the Transfer of Property and Succession (Amendment) Bill, 1946, was introduced in the Central Legislative Assembly and published in the Gazette of India dated the 16th February 1946. The Bill was referred to a Select Committee. The Select Committee presented its report on the 25th March 1946. The Select Committee was not in favour of a Central Enactment with application throughout British India and therefore suggested that the question of introducing relevant Provincial legislation may be considered by the Provincial Governments. The Central Government did not therefore pursue the question of enacting a Central Act on the subject.

3. The Transfer of Property, the Hindu Disposition of Property and the Indian Succession (Bombay Amendment) Bill, 1946 was not taken up at the last session of the Bombay Legislative Assembly. But the Honourable the Prime Minister has recorded a minute on the subject on the 8th April 1947, a copy of which is enclosed. As directed by the Honourable the Prime Minister I am to request you to be so good as to favour Government with your views on the point raised by him. I may invite your attention to my opinion No. 827 dated the 3rd April 1945 as District Judge, Belgaum and the minute of dissent of Mr. T. Chapman - Mortimer which may be found useful in considering that point.

4. After the Bill was published in the Gazette certain suggestions have been received in respect of clause 2(b) Ordinarily a person domiciled in this Province even if he

executes the document outside the Province would be governed by the xlaws of the Province in respect of his moveable property. But when we make the proposed Act applicable only when the document is executed in the Province it may be held that such person is not entitled to the benefit of this Act if the document is not executed in the Province. To cover the risk of excluding such persons sub-clauses (b) and (c) as shown in the copy of the Bill sent herewith. Revised sub-clause (b) is for persons domiciled in the Provinces executing the document in the Province or outside and revised sub-clause (c) for all persons irrespective of their domicile executing the document in the Province. The Advocate General is requested to favour Government with his views on revised clause 2 also.

Sub-clause (b) is proposed to be divided into

Id/- P.M.L.
15-5

Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 4978, dated the 15th May 1947.

PSM. 23/5
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Copy of the minutes of the Honourable the Prime Minister dated the 8th April, 1947,.

"As the Bill cannot be brought up in this session, I suggest we might now send the papers back to the Advocate General and consult him whether a validitating Bill is not for the present a better solution".

PSM. 23-5
4C

No. 45 of 1947.

Advocate General's Chambers,
High Court,

Bombay, 25th August 1947.

U.O.R. to the Advocate General of Bombay,
No. 4978 dated the 15th of May 1947.

O P I N I O N.

The Bill called the Transfer of Property and Succession Amendment Bill, 1946, as at present drafted, directs inter alia the omission of section 13 from the Transfer of Property Act and section 113 of the Succession Act, and provides for corresponding and consequential changes in the Hindu Disposition of Property Act, the Bill being motivated by the decision in the case of Sopher Vs. the Administrator General of Bengal. That case invalidated a large number of dispositions framed by the lawyers in Bombay whether by way of Will or trust relying on certain judicial dicta. The number of such dispositions is so large and the time over which such dispositions have been affected so long that a great and extensive hardship would be caused, if they were to be all invalidated.

2. The proposed omission of sections 13 and 113 would no doubt effectively validate such dispositions and render Sopher's case nugatory in this province, but it is to be considered whether the effect also may not be to render valid, dispositions not affected by Sopher's case which would be invalid otherwise under that section. Taking the Transfer of Property Act it will be seen that sections 13, 14, 15, 16 17 and 18 form a sort of code, each section is an integral part, and one must take it, as indeed is the fact, that each is necessary. It has been suggested that section 14 is in itself so

so complete a protection that section 13 is unnecessary. I am unable to subscribe to that proposition. Section 14 provides that no transfer can "operate to creat an interest which is to take effect", etc. It is not stated who is to be the one or more persons living at the date of transfer, but it is possible that none of these persons need necessarily be beneficiaries. Thus it would be open to the transferor to create successive interests for life in a number of persons provided that those interests take effect during the lifetime of some person, not necessarily one of them, and not necessarily the transferor himself. Thus there may be a limited interest created in favour of persons not born at the date of transfer.

3. It is possible to conceive of other instances where a disposition may be made not offending against section 14, but which would be invalid by reason of section 13. It seems to me that the omission of section 13 ~~xx~~ completely may have consequences which may in some cases be very undesirable.

4. It is true that in England by the Law of Property Act, 1925, particularly section 163, the effect of Whitby Vs. Mitchel (44Ch.D., 85) has been modified. It is to be remembered however, that the Law of Property in England is complicated by equitable interests not recognised in India and that the law there permitted such estates as estate in tail.

5. There is another aspect which requires a title consideration. The Hindu Law prevented any gift to an unborn person. That strict rule was modified by the Hindu Disposition of Property Act, being Act XV of 1916 whereby under sections 2 and 3 it was enacted, in substance that a Hindu might make a disposition in favour of an unborn person subject to the limitations and provisions of sections 13, 14 and 20 of the Transfer

of Property Act, and sections 113 and 114 of the Succession Act. This was in the nature of a concession to Hindus repugnant to the Hindu Law. That concession would by the omission of section 13 be extended, if I am right in saying that section 14 has not all the effect of section 13.

6. Apart from the above considerations it seems to me on general principles not very desirable that the effec of decisions on the interpretation of a statute should be counteracted by amendment of the statutory law, except in the very rare cases where some provision of law has been patently omitted from consideration by the judges so as to render a judgment erroneous in the eyes of all, i.e. the judgment is universally regarded as wrong. In this particular case that is not the position, because it was not conceded by the representatives of other provinces when the corresponding bill was introduced in the Central Assembly that the view taken in Sopher's case by the Privy Council was either novel or unexpected or erroneous. Further, it is desirable to keep the statute law relating to property and the disposition of it uniform so far as possible all over the country. If a provincial amendment is made of the nature contemplated, a Madrasi for example, i.e. a man domiciled in Madras may well contend that by the Charter he is entitled to his personal law that the Succession Act and the Transfer of Property Act, and the Hindu Disposition of Property Act, prevailing in his province constitute his personal law, and that so long as the rights under the Charter Stand, it is not open to any legislature to impinge upon that law, so as to affect him. Even if the above be wrong, there will be this complication that a testamentary disposition or dispositions inter vivos will be a bad one bad one by reason of the existence of section 13 in so far as it affects immoveable property in other provinces, but good in so far as it affects immoveable property within this province.

7. The dispositions which will be invalidated by Sopher's case have prevailed, so far as I am aware, only in the city of Bombay and not elsewhere. I feel that the better way would be to introduce a bill merely validating these dispositions. For the future, the law is settled by Sopher's case rightly as opinion in other provinces goes, and it is for those who wish to make dispositions to conform to it as it stands. It will be open to the Central Legislature, if the general sentiment is so inclined, to alter the law. I believe a validating bill has als been drafted, and it can be put through expeditiously.

8. Reference in this connection may be carefully made to the opinion of Mr. Lad which is in the file. There is a good deal of force in his view that omission of section 13 would conduce to a greater latitude of disposition particularly by will than is allowed under the Hindu Law as modified by the Hindu Disposition of Property Act, that the omission of section 13 would be even more contrary to the spirit of the Hindu Law and that for that reason it is undesirable.

9. As however, it is desirable that the hardship now prevailing at least in this city by reason of Sopher's case should be relieved as early as possible. If it is not feasible to put through a validating bill as ready will to go through leaving any complications that may be caused thereby to be dealt with as they arise by suitable amendment or new legislation.

Sd/-

Advocate General.

PSM. 23/5
4C

No. 11394

Legal Department,

Bombay Castle, 28th November 1947.

From

P.M.Lad, Esquire, I.C.S.,
Secretary to the Government of Bombay.

To

The Private Secretary to the Governor of Bombay.

Subject:- A Bill to validate certain dispositions of property in the Province of Bombay.

Sir,

With reference to section 75 of the Government of India Act, 1935, I am directed to forward herewith for being presented to His Excellency the Governor, the authentic copy of the Bill to validate certain dispositions of property in the Province of Bombay, which was read for the third time and passed at the meetings of the Bombay Legislative Assembly and the Bombay Legislative Council held on the 16th and the 20th October 1947, respectively.

2. The subject-matter of the Bill falls under entries 7, 8 and 9 in List III in the Seventh Schedule to the Government of India Act, 1935.

3. As the provisions of the Bill are repugnant to the provisions of the Indian Succession Act, 1925, which is an existing law relating to entry 7 in the Concurrent Legislative List, it is necessary to reserve the Bill for the consideration of the Governor-General with reference to section 107(2) of the Government of India Act, 1935.

4. I also forward herewith six copies of each of the

1. Bill as introduced in the Bombay Legislative Assembly with the Statement of Objects and Reasons. 2. Bill as read for the third time and passed by the Bombay Legislative Assembly and as introduced in the Bombay Legislative Council. 3. Bill as read for the third time and passed by the Bombay Legislative Council. 4. Extracts from the proceedings of the Bombay Legislative Assembly dated the 16th October 1947 and of the Bombay Legislative Council dated the 20th October 1947.	Items Nos. 1 to 3 and two copies of item No. 4 of the papers noted in the margin. The Bill was not referred

to a select Committee.

I have the honour to be,

Sir,

Your most obedient servant,

Id/- P.M.L.

28-4

Secretary to Government.

PSM. 23/5
46

No. P.S.G. - 5588
Office of the Private Secretary to the
Governor, Government House,

Bombay, 3rd December 1947.

From

L.E.Bagshawe, Esquire, I.C.S.,
Private Secretary to the Governor of Bombay.

To

The Secretary to the Bombay Legislature Department,
Council Hall, Bombay.

Subject:- The Dispositions of Property(Bombay)
Validation Bill, 1947.

Sir,

With reference to the above-mentioned Bill which was read for the third time and passed at the meetings of the Bombay Legislative Assembly and the Bombay Legislative Council held on the 16th and 20th October 1947, respectively, I am directed to state, for the information of the Honourable the Speaker and the Honourable the President, that as the provisions of the Bill are repugnant to the provisions of the Indian Succession Act, 1925, which is an existing law relating to entry 7 in the Concurrent Legislative List it is necessary to reserve the Bill for the consideration of His Excellency the Governor-General with reference to section 107(2) of the Government of India Act, 1935. His Excellency the Governor accordingly pleased, under section 85 of the Government of India Act, 1935, to declare that he reservesthe Bill for the consideration of His Excellency the Governor-General.

Your obedient servant,

Sd/- L.E.Bagshawe,

Private Secretary to the Governor of
Bombay.

No. P.S.G. -5588
Office of the Private Secretary to the
Governor of Bombay.

No. P.S.O. --5580
Office of the Private Secretary to the Governor,
Bombay, 3rd December 1947.

Copy forwarded with compliments for information to the Secretary to Government, Legal Department, with reference to his letter No. 11391, dated the 28th ~~November~~ November 1947.

By order of the Governor of Bombay,

Sd/- L.E.Bagshawe,

Private Secretary to the Governor of Bombay.

PSM. 23/5
4C

47

NO. P.S.G. -84
Government House,
Bombay, 12th January 1948.

From

L.E.Bagshawe, Esquire, I.C.S.,
Private Secretary to the Governor of Bombay.

To

The Secretary to Government,
Legal Department, Bombay.

Subject:- The Dispositions of Property (Bombay) Validation Bill, 1947.

Sir,

With reference to the correspondence resting with my endorsement No. P.S.G. 5589, dated the 3rd December 1947, on the above subject, I am directed to inform you that His Excellency the Governor-General has, under the provisions of sub-section (1) of section 76 of the Government of India Act, 1935, assented to the Dispositions of Property (Bombay) Validation Bill, 1947, on the 30th December 1947.

2. The authentic copy of the Bill with his Excellency the Gov's assent Signified thereon is returned herewith.

Your obedient servant,

Sd/- L.E.Bagshawe,

Private Secretary to the Governor of Bombay.

PSM. 23/5
4C

Bills.

A Bill to amend the Transfer of Property Act, 1882, the Hindu Disposition of Property Act, 1916, and the Indian Succession Act, 1925, in their application to the Province of Bombay.

GOVERNMENT OF BOMBAY.
Legal Department.
Resolution No. 536-L

Council Hall , Poona, 24th August 1946.

RESOLUTION:- The Bill with the Statement of Objects and Reasons should be forwarded to the Manager, Government Central Press, Bombay, for publication in the Bombay Government Gazette, dated the 26th August 1946, as Bill No. XVII of 1946.

2. The Bill and the Statement of Objects and Reasons should be translated into Marathi, Gujarati Kannada and Hindustani (in Urdu and Devnagari scripts) and the translations should be published in the Bombay Government Gazette, on the 26th August 1946.

3. The dates of the various publications should be reported to the Secretary to the Bombay Legislative Assembly.

By order of the Governor of Bombay

Sd/- K.M.CHITNVIS,

Assistant Secretary to the Government of Bombay
Legal Department.

To

The Manager, Government Central Press, Bombay, (with the Bill and the Statement of Objects and Reasons and with a request that 230 Gazette copies of the Bill and the S.O.R. may be forwarded to the Secretary to the Bombay Legislative Assembly for distribution to the Members of the Bombay Legislative Assembly and 25 copies of the use of the Legal Department).
The Oriental Translator to Government,) With a
The Secretary to the Bombay Legislative) copy of
Assembly,) the Bill and
The Director of Information, Bombay.) S.O.R.

PBM. 23/5
4C

Bills.
A Bill to validate certain dispositions of property in the Province of Bombay.

GOVERNMENT OF BOMBAY.
Legal Department,
Resolution No. 102-L

Council Hall, Poona, 6th October 1947.

RESOLUTION:-- The Bill with the Statement of Objects and Reasons should be forwarded to the Manager, Government Central Press, Bombay, for publication in the Bombay Government Gazette, dated the 6th October 1947, as Bill No. LVI of 1947.

2. The Bill and the Statement of Objects and Reasons should be translated into Marathi, Gujarati, Kannada and Hindustani (in Urdu and Devnagari scripts) and the translations should be published in the Bombay Government Gazette, on the 10th October 1947.

3. The dates of the various publications should be reported to the Bombay Legislative Department.

By order of the Governor of Bombay,

Sd/- S.B.Palekar,

Deputy Secretary to Government

To

The Manager, Government Central Press, Bombay (with the Bill and Statement of Objects and Reasons and x xx with a request that 230 Gazette copies of the Bill ~~and~~ and the Statement of Objects and Reasons may be forwarded to the Bombay Legislature Department for distribution to the Members of the Bombay Legislative Assembly and 35 copies for use of the Legal Department).

The Oriental Translator to Government.) With a copy
The Bombay Legislature Department.) of the Bill
The Director of Publicity, Bombay.) and the statement of Objects and Reasons.

PSM. 23/5
4C

Acts.

Publication of the Disposition of Property (Bombay) Validation Act, 1947.

GOVERNMENT OF BOMBAY.
Legal Department,
Resolution No. 525.

Bombay Castle, 16th January 1948.

Letter to the Private Secretary to the Governor, No. 11391, dated the 28th November 1947.

Letter from the Private Secretary to the Governor, No. P.S.G. -84, dated the 13th January 1948.:-

"With reference to the correspondence resting with my endorsement No. P.S.G. 5589, dated the 3rd December 1947, on the above subject, I am directed to inform you that His Excellency the Governor-General has, under the provisions of sub-section (1) of section 76 of the Government of India Act, 1935, assented to the Dispositions of property (Bombay) Validation Bill, 1947, on the 30th December 1947.

2. The authentic copy of the Bill with His Excellency the Governor-General's assent signified thereon is returned herewith".

RESOLUTION:- The law should be published as Bombay Act No. LIV of 1947, in the Bombay Government Gazette dated the 16th January 1948.

3. The Act should be translated into Marathi, Gujarati, Kannada and Hindustani (in Urdu and Devnagari scripts) and the translations should be published in the Bombay Government Gazette.

By order of the Governor of Bombay,

Sd/- S.B.Palekar,

Deputy Secretary to Government.

To

The Manager, Government Central Press, Bombay, (with a copy of the Act and with a request that 30 Gazette copies of the Act may be forwarded to the Legal Department).

The Oriental Translator to Government,
The Bombay Legislature Department,
The Director of Publicity, Bombay,
The Enquiry Officer for the Secretariat, Bombay.

) With a copy of the Act.

SPK 23/5

9/4/5 M. 23/5